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ABSTRACT

The Office of Standards, Policy and Research reviews cases and responds to inquiries from within the Office of Civil Rights (OCR) to ensure that compliance determinations are consistent with established policy. This report consists of summaries of significant case-related policy clarification memoranda issued during June and July 1979. The cases summarized fall under three Federal laws: Title IX of the Education Amendments of 1972; Title VI of the Civil Rights Act of 1964: and Section 504 of the Rehabilitation Act of 1973. (RLV)

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DIGEST OF SIGNIFICANT CASE-RELATED MEMORANDA

ISSUED BY THE

OFFICE OF STANDARDS, POLICY AND RESEARCH*

OFFICE FOR CIVIL RIGHTS

JUNE AND JULY 1979

VOLUME 1 NUMBER 2

*The Office of Standards, Policy and Research reviews cases and responds to inquiries from within the Office for Civil Rights (OCR) to ensure that compliance determinations are consistent with established policy. Normally, these inquiries arise during complaint investigations and compliance reviews conducted by OCR staff. This report consists of summaries of significant case-related policy clarification memoranda issued during June and July 1979. Items summarizing memoranda are grouped by the major statutes administered by OCR. Items that pertain to more than one statute are found at the end of the report.

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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Title IX
of the Education Amendments of 1972

Issue:

May pregnant students be excluded from the regular education program?

Facts:

During a compliance review, OCR learned that a school district had a policy that permitted the exclusion of pregnant students from the regular education program "where their presence is disruptive to others or dangerous to themselves." The district had no similar policy affecting participation of students with other temporary disabilities.

Decision:

Exclusion of a student from the regular education program because of her pregnancy violates Title IX. A school district may offer a separate program for pregnant students, but participation in the program must be voluntary. In addition, a pregnant student may be required to obtain a physician's certification that she is physically and emotionally able to participate in an education program or activity only if such certification is required of all students with physical or emotional conditions requiring a physician's attention.

Authority:

The decision was based on the following section of the Title IX regulation.

Section 86.40(b) Pregnancy and related conditions.

(1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

Page 2 - May pregnant students be excluded from the regular education program?

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

OSPR Memorandum of June 13, 1979

Title IX
of the Education Amendments of 1972

Issue:

May descriptions or titles of extracurricular activities state or imply that they are intended for students of a particular sex?

Facts:

During a complaint investigation, OCR examined the operation of a school district's extracurricular activities. District officials stated that all activities were open to male and female students. OCR found that students of each sex participated in most of the extracurricular activities offered but that some activities had all-male or all-female memberships. One of the sections of a handbook for the district's students contained descriptions of the extracurricular activities offered. Of the activities having single-sex memberships, several were listed in the handbook with titles or descriptions indicating they were intended for students of a particular sex. For example, the Future Farmers of America chapter, which had an all-male membership, was described as "open to all boys . . . ."

Decision:

The school district violated Title IX by discriminating on the basis of sex in limiting a student's eligibility to participate in extracurricular activities. The district also violated Title IX by its use of a publication suggesting that the school district treated students differently on the basis of sex. It was therefore required to:

1) notify all school district personnel, students, and parents that all activities are open to male and female students;

2) revise activity titles and descriptions so they do not imply they are intended for students of a particular sex.

Page 2 - May descriptions or titles of extracurricular activities state or imply that they are intended for students of a particular sex?

Authority:

The decision was based on the following sections of the Title IX regulation.

Section 86.31 Education programs and activities.

(a) General. Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extra-curricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefits, or service.

Section 86.9 Dissemination of Policy.

(b) Publications.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

OSPR Memorandum of June 15, 1979

Title IX
of the Education Amendments of 1972

Issue:

May a State or local education agency have rules governing the assignment and compensation of game officials that differ on the basis of the sex of the players?

Facts:

OCR received a complaint that the policies and practices of a State high school athletic association discriminated on the basis of sex. Although the athletic association was not a recipient of Federal financial assistance for education programs and activities, it had been delegated responsibility for supervision of high school athletics by the State Department of Education, a recipient of Federal assistance.

OCR found that many of the association's rules, regulations and practices governing the assignment and compensation of game officials differed on the basis of the sex of the players. For example, the association permitted fewer officials to be assigned to girls' games than boys' in comparable sports. It permitted probationary officials to be assigned to some girls' events while requiring experienced officials to be assigned to comparable events for boys. In general, officials assigned to girls' games were less experienced than those assigned to boys'. The fee schedules established for boys' and girls' games provided lower compensation for officials at girls' games.

Decision:

The Title IX regulation does not specifically address the assignment and compensation of officials under the factors listed that OCR may consider in determining the availability of equal athletic opportunity. The enumeration of factors, however, is not a limitation on the items OCR may deem pertinent in assessing the provision of equal opportunity. Access of male and female teams to equally qualified game officials is an important element in the provision of such opportunity. Therefore, the State education agency (SEA) was found in violation of Title IX because the organization to which it had delegated its responsibility for supervision of athletics had practices and policies governing assignment and compensation of game officials that resulted in lesser athletic

opportunities for female students. The SEA was required to insure that policies regarding the assignment of officials to boys' and girls' competition were sex neutral and, if there were a shortage of officials, that boys' and girls' teams would have equal access to available officials, including those with experience. The SEA was also required to insure the adoption of a sex-neutral fee schedule for officials.

Authority:

The decision was based on the following section of the Title IX regulation.

Section 86.41 Athletics.

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

Page 3 - May a State or local education agency have rules governing the assignment and compensation of game officials that differ on the basis of the sex of the players?

(vii) Provision of locker rooms, practice and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

OSPR Memorandum of July 5, 1979

Title IX
of the Education Amendments of 1972

Issue:

Are data about the operation of a college or university's athletic program during the three-year adjustment period valid in determining the recipient's compliance status?

Facts:

OCR received complaints in August and October 1978 that a university's athletic program did not provide equal opportunity for female students. In response to the complaints, OCR initiated an investigation in November 1978, collecting information about the athletic program during the three previous academic years. The data collected indicated that the university athletic program did not meet Title IX requirements.

Decision:

Data collected about a recipient's athletic program during the three-year adjustment period are valid and can support a finding of non-compliance. The three-year adjustment period was not a waiting period, but was intended to give those recipients that needed to implement major changes time in which to complete them. Adjustments that could have been made immediately should have been made. Those adjustments requiring a longer period of time should have been initiated during the adjustment period and completed as quickly as possible but by no later than the inception of the 1978-79 academic year. Prior to issuing the LOF, however, it would be advisable to update the data on which conclusions about the recipient's compliance status are based.

Authority:

The decision was based on the following section of the Title IX regulation.

Section 86.41 Athletics.

(d) Adjustment period. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural

Page 2 - Are data about the operation of a college or university's athletic program during the three-year adjustment period valid in determining the recipient's compliance status?

athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

OSPR Memorandum of July 13, 1979

Title IX
of the Education Amendments of 1972

Issue:

Is school board action to drop a discriminatory requirement a sufficient remedy?

Facts:

A complainant alleged that a school district had a requirement that all female students take home economics as a prerequisite for graduation. Male students did not have the same requirement. In a letter, OCR informed the school district superintendent of the complaint. The superintendent responded that subsequent to being notified of the complaint the school board had rescinded the requirement. A copy of the school board minutes registering this action accompanied the superintendent's letter.

Decision:

The school district had violated Title IX by having different graduation requirements for males and females. School board action rescinding the discriminatory requirement for female students, while important, was not a sufficient remedy for the violation because affected students and staff may not have been aware of the school board's action. The school district was required to provide OCR with evidence that all staff, students, and parents had been notified that the requirement had been dropped before the complaint could be closed.

Authority:

The decision was based on the following sections of the Title IX regulation.

Section 86.3 Remedial and affirmative action and self-evaluation.

(a) Remedial action. If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

Page 2 - Is school board action to drop a discriminatory requirement a sufficient remedy?

Section 86.31 Education programs and activities.

(b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment.

OSPR Memorandum of July 13, 1979

Title IX
of the Education Amendments of 1972

Issue:

Is there a sufficient difference in boys' baseball and girls' softball to justify differences in coaches' stipends?

Facts:

OCR received a complaint that a school district paid coaches of boys' teams more than coaches of girls' teams. Because less pay for coaches of female students than male students could result in less availability of well-qualified coaches for female teams, OCR investigated the complaint and found that the allegation was correct. The discrepancy in average pay for boys' and girls' coaches resulted primarily from the difference in pay for boys' baseball coaches and girls' softball coaches. The boys' baseball coaches received a stipend of $1585 while the girls' softball coaches received $1044. The school district stated that the difference in stipends was partly due to differences in the equipment used, the risk of injury, and the techniques involved in the two sports. Specifically, the school district claimed that the baseball teams used protective cups and batting helmets which were not used by the softball teams. In addition, baseball team members were required to wear shin guards while their use by softball team members was optional. School officials gave as evidence of a higher risk of injury in baseball the fact that accident insurance premiums were $4.00 for baseball players and $2.00 for softball players. They also stated that baseball involved two playing techniques, bunting and base-stealing, that were not used in softball.

Decision:

OCR did not find sufficient difference in equipment used, risk of injury, or playing techniques to justify the disparity in coaching stipends for baseball and softball. Prior to issuance of the letter of findings, however, the school district voluntarily revised its schedule for extra-duty pay. The revised schedule provides the same stipend, $1670, for coaches of baseball and softball.

Authority:

The decision was based on the following section of the Title IX regulation.

Page 2 - Is there a sufficient difference in boys' baseball and girls' softball to justify differences in coaches' stipends?

Section 86.41 Athletics.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(vi) Assignment and compensation of coaches and tutors.

OSPR Memorandum of July 20, 1979

Title IX
of the Education Amendments of 1972

Issue:

May school districts participate in or support an athletic association that discriminates on the basis of sex?

Facts:

OCR received a complaint that a State high school athletic association prohibited female high school students from participating in its golf tournaments. The complainant, the third ranking player and only female on her high school's six-member golf team, had competed in six local matches her team had entered. Her high school does not offer separate golf teams for students of each sex. Its athletic opportunities for females have previously been more limited than those for males. When her team entered a regional tournament, State high school athletic association officials told her she could not play because she was female. Membership in the State high school athletic association is composed of administrators and coaches from participating public and private schools. Member schools must pay dues and agree to abide by the association's rules and regulations. The association is not a recipient of Federal financial assistance for education programs and activities. Most of its member schools, however, receive such aid.

Decision:

School districts receiving Federal assistance are barred by Title IX from discriminating on the basis of sex in their education programs and activities, including their athletic programs. The rules of an athletic association do not obviate their responsibility to comply with Title IX. Therefore, the school district's accession to the exclusion of its female team member places it in violation of the athletics provisions of Title IX. Second, the district is in violation of Title IX by failing to insure that a program it does not operate directly, but in which it facilitates participation as part of its education program, is free of illegal sex discrimination.

Authority:

The decision was based on the following sections of the Title IX regulation.

Section 86.41 Athletics.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

Section 86.6 Effect of other requirements.

(c) Effect of rules or regulations of private organizations. The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

Section 86.31 Education programs and activities.

(d) Programs not operated by recipient.

(1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by

such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

OSPR Memorandum of July 30, 1979

Title IX
of the Education Amendments of 1972

Issue:

Are students subjected to discrimination when coaches of teams for one sex receive less pay than coaches of teams for the other sex although the skill, effort and responsibility required of all coaches are equal and they perform under similar working conditions?

Facts:

OCR received a complaint alleging that the female coaches of the girls' volleyball teams received less extra-duty pay than male coaches of boys' teams. OCR investigated and found that the average stipend for coaches of girls' teams as a whole was less than for boys' teams even though the skill, effort and responsibility required of all coaches were equal and they performed their duties under similar working conditions. Specifically, the length of season, amount of time spent in practices, and number of students supervised were approximately the same for all coaches.

Decision:

The payment of lower stipends to coaches of girls' teams may subject female students to having less qualified coaches and to coaches who may feel they need not expend the same degree of effort as the higher paid coaches of male teams. Discrimination in compensation of coaches on the basis of the sex of the players being coached therefore violates the equal athletic opportunity provisions of Title IX.

Authority:

The decision was based on the following section of the Title IX regulation.

Section 86.41 Athletics.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(vi) Assignment and compensation of coaches and tutors.

OSPR Memorandum of July 30, 1979

Title IX
of the Education Amendments of 1972

Issue:

Must school newspapers and yearbooks provide equal coverage of male and female athletic teams?

Facts:

A complaint filed with OCR charged that a school had publicized the athletic program for female students less extensively than the athletic program for male students. OCR found that the school had submitted articles about all teams to the community newspaper but it had no control over which articles the newspaper published. Coverage of the teams in the high school newspaper and yearbook was also examined. OCR found that over a year-long period, the school newspaper had published 14 pictures of boys' sports events and none of girls' sports. The sports page of the newspaper also provided much less space for coverage of the girls' athletic program than for the boys' during the same time period. The school yearbook for the previous three years had also provided less coverage of the girls' athletic program.

Decision:

OCR cannot determine whether a recipient has publicized its male and female athletic programs equally on the basis of the coverage of its athletic program in local or school-operated newspapers and other media. To do so would imply that a recipient could control such media, an infringement on press freedom protected by the First Amendment. Information obtained on this issue should address whether the recipient's efforts to provide information to such media are equal for the athletic programs for each sex. Information should also be obtained about whether publicity items over which the recipient has legitimate control, i.e., posters, public address announcements, game schedules, and press releases, address the athletic programs for each sex equally.

Authority:

The decision was based on the following section of the Title IX regulation.

Section 86.41 Athletics.

Page 2 - Must school newspapers and yearbooks provide equal coverage of male and female athletic teams?

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(x) Publicity.

OSPR Memorandum of July 30, 1979

Title VI
of the Civil Rights Act of 1964

Issue:

Can OCR require a remedy for discrimination that took place before the effective date of Title VI?

Facts:

The complainant filed a complaint with OCR in 1975 alleging that she was dismissed from her teaching position discriminatorily by a federally assisted local education agency (LEA) in 1958. She did not apply for reinstatement. Between the passage of Title VI of the Civil Rights Act of 1964, July 2, 1964, and 1977, the LEA hired no black teachers.

Decision:

Title VI does not provide a remedy for racial discrimination that occurred prior to the effective date of Title VI, unless the effects of that discrimination continue. Where such effects persist, a recipient must take immediate steps to eliminate them. In the case at hand, the fact that a pattern of similar discrimination continued after the effective date does not create an obligation to provide a remedy for discrimination against specific individuals who were victims of discrimination prior to that date.

Authority:

Title VI was not enacted until July 2, 1964 and its requirements are not retroactive. 42 U.S.C. 2000d.

OSPR Memorandum of June 13, 1979

Title VI of the Civil Rights Act of 1964

Issue:

Is a nursing home in violation of Title VI if it refuses to participate in the Medicaid program?

Facts:

A nursing home applied to a State health systems agency (HSA) for Federal assistance. The nursing home refused to participate in the Medicaid program. Although OCR had previously found the home in compliance with Title VI, a question about the home's compliance status was raised because it refused to participate in the Medicaid program. OCR was requested to reinvestigate the nursing home to determine its compliance with Title VI.

Decision:

The fact that a nursing home chooses not to participate in the Medicaid program may constitute evidence of discrimination in violation of Title VI of the Civil Rights Act of 1964. However in this case, the information that the recipient chooses not to participate in the Medicaid program, by itself, does not obligate OCR to conduct an investigation.

The recipient is required by the Public Health Service Act (PHSA) to participate in Medicaid if it has received Hill-Burton funds in the past or if its present application for a mortgage insurance commitment from HUD falls under program requirements applicable to Titles VI and XVI of PHSA (see 42 CFR 124-601-607-Subpart G - Community Service Requirements). If it is found that the nursing home is required to participate in Medicaid under Subpart G - Community Service Requirements, the case should be referred to the Public Health Service to effect compliance with its program requirements.

Page 2 - Is a nursing home in violation of Title VI if it refuses to to participate in the Medicaid program?

Authority:

The policy decision is based on the following section of the Title VI regulation.

Section 80.3(a) General

So person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under nay program to which this part applies.

Since Title VI does not automatically require participation in any program(s) of Federal financial assistance, an investigation is not warranted solely on the basis of failure to participate in any such program.

OSPR Memorandum of July 5, 1979

Section 504
of the Rehabilitation Act of 1973

Issue:

Can recipient institutions for the mentally ill exclude residents from employment at the institution?

Facts:

A State Department of Mental Health and Mental Retardation traditionally employed institutional residents in a variety of contexts, including dietary, laundry, farm labor, clerical, shop, storeroom, powerhouse, and housekeeping jobs. The resident employees were paid nominal wages. In 1974 the State adopted a rule prohibiting such employment. The State policy coincided with a Federal court decision which held that residents of State institutions were covered by the Fair Labor Standards Act (FLSA) and were entitled to compensation accordingly. A number of the jobs held by patients were subsequently filled by nonpatients who were paid under the terms of the FLSA.

In 1976, the United States Supreme Court struck down the section of the FLSA which extended coverage under the Act to all State employees. Although the apparent impetus for the 1974 State rule against employing residents no longer existed, the State did not alter its policy.

Decision:

Residents of mental institutions are "otherwise qualified handicapped individual[s]" within the meaning of Section 504 and its implementing regulations, and, therefore, are entitled to its protection. There is no basis identified in the statute, the legislative history, or the regulations for excluding any otherwise qualified class of handicapped persons from the protection of Section 504. It is a violation of Section 504 and of the Department's regulation to exclude patients from consideration for employment simply because of their status as institutional residents.

Authority:

The decision was based on the following sections of the Department's regulation:

Page 2 - Can recipient institutions for the mentally ill exclude residents from employment at the institution?

Section 84.3 Definitions.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(4) with respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

Section 84.4 (b) Discriminatory actions prohibited.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the pur-

pose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons.

Section 84.11 (a) General.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

OSPR Memorandum of June 6, 1979

Section 504
of the Rehabilitation Act of 1973

Issue:

Can a law school reject a handicapped applicant on the basis of poor aptitude test scores that may be related to his handicap?

Facts:

A visually impaired law school applicant was not admitted by a law school because of his low scores on the Law School Aptitude Test (LSAT). The student filed a complaint asserting that his visual handicap contributed to his poor performance in written examinations. The OCR investigation found that the applicant had scored substantially below the LSAT norm for the accepted students. The law school had granted his request to include the Wechsler Intelligence Test to offset the LSAT scores, and weighed his performance on this test, along with other selection factors. However, even with this additional criterion, the complainant was not considered to be as qualified as the successful applicants, including several handicapped persons who were admitted on the basis of alternative selection criteria.

Decision:

OCR determined that the law school had not violated Section 504 by considering, among other criteria, the complainant's scores on the LSAT and the Wechsler Intelligence Test. Pending resolution of the complex issues associated with testing, OCR will not find an institution out of compliance if that institution requires the submission of test scores by applicants, even though there is a possibility that the tests do not reflect the individual's aptitude as accurately as they do for nonhandicapped applicants. However, to assure that it is in compliance with Section 504, the institution must guarantee that admissions decisions consider other factors such as prior academic records and personal recommendations. The investigation revealed that the law school had not only considered criteria other than the complainant's LSAT scores, but had also considered the scores of an additional intelligence test selected by the complainant. The admissions practices of a law school that has rigorous standards and many qualified applicants will necessarily result in the selection of the handicapped and nonhandicapped students with the strongest credentials.

Page 2 - Can a law school reject a handicapped applicant on the basis of poor aptitude test scores that may be related to his handicap?

Authority:

The decision was based upon the following sections of the regulation:

Section 84.3 Definitions.

(k) "Qualified handicapped person" means:

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

Section 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

Section 84.42 Admissions and recruitment.

(a) General. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) Admissions. In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available.

OSPR Memorandum of July 5, 1979

Section 504
of the Rehabilitation Act of 1973

Issue:

Is an institution of higher education required to make structural alterations to its facilities in order to achieve program accessibility?

Facts:

A student filed a complaint against his college alleging that offices providing such services as Veterans Affairs, student parking arrangements and student employment placement were located in inaccessible, or partially accessible, buildings on the recipient's campus.

Decision:

Program accessibility is not necessarily dependent upon structural alterations. The college may ensure program accessibility by relocating services and classes in accessible facilities. For example, if the Veterans Affairs counselor scheduled meetings with handicapped veterans at another location and provided the same information as was available to nonhandicapped veterans at the inaccessible office, the recipient would satisfy the requirements of the regulation. Similarly, if the office issuing parking permits normally required the applicant to obtain a permit in person, it could waive this requirement for handicapped persons for whom the office was inaccessible. The extent to which such alternatives to changing the permanent location of a program or service are permissible will normally depend upon a factual determination of whether the full benefits of the programs can be made available by shifting the location of the service or providing it via telephone, by mail, or through a third party.

Authority:

The decision was based on the following section of the regulation:

Page 2 - Is an institution of higher education required to make structural alterations to its facilities in order to achieve program accessibility?

Subpart C - Program Accessibility

Section 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

Section 84.22 Existing facilities.

(a) Program accessibility. A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) Methods. A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

OSPR Memorandum of July 23, 1979

Section 504
of the Rehabilitation Act of 1973

Issue:

Is a school district obligated to alter transportation schedules to enable a handicapped student to participate in extracurricular activities occurring after regular school hours?

Facts:

A complaint filed by a student's parents asserted that local school district refused to provide their deaf child with an appropriate education within the district. The local district placed the child in a school for the deaf in a neighboring district, paid for the child's program, and provided transportation to and from that placement. However, the local district refused to provide late bus service to permit the student's participation in after-school extracurricular activities. The local district asserted that these activities were not specified in the IEP and were not, therefore, essential to a free appropriate public education.

Decision:

The regulation requires the local school district to make whatever special transportation arrangements are necessary to permit participation in extracurricular activities. Handicapped children must be afforded an opportunity to engage in such activities equal to that provided to nonhandicapped children. The only way this requirement can be effected by the school district is through providing special transportation for the student on those days when she participates in after school activities.

Authority:

The decision was based upon the following sections of the regulation:

Section 84.37 Nonacademic services.

(a) General. (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

Page 2 - Is a school district obligated to alter transportation schedules to enable a handicapped student to participate in extracurricular activities occurring after regular school hours?

Section 84.33 Free appropriate public education.

(c)(2) Transportation. If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

OSPR Memorandum of July 30, 1979

Title VI of the Civil Rights Act of 1964
and
Section 504 of the Rehabilitation Act of 1973

Issues:

Does Title VI bar discrimination on the basis of race, color or national origin in employment where the purpose of the Federal financial assistance is to provide employment?

Does Section 504 bar discrimination on the basis of handicap in employment where the alleged discrimination occurred prior to the effective date of the Section 504 regulation?

Facts:

OCR received a complaint filed by a handicapped, minority employee of a State rehabilitation agency who was terminated from employment on May 12, 1977. During his employment, the complainant was also a client of the agency. The Federal financial assistance to the State rehabilitation agency was intended to help states prepare handicapped individuals for gainful employment.

Decision:

Under Title VI, employment jurisdiction exists where a primary objective of the Federal financial assistance is to provide employment. Since a primary objective of the assistance was to provide employment, OCR has employment jurisdiction under Title VI.

It is Departmental policy to investigate complaints filed prior to the effective date of the Department's 504 regulation, June 3, 1977, only if the complaint charges a violation of the statute that does not require the interpretative language of the regulation for resolution. Thus, the Department will investigate a case alleging employment discrimination on the basis of handicap before June 3, 1977 only if adjustments would not have been needed to accommodate the applicant's handicap. In this case the incident complained of occurred before June 3, 1977, and the issue is adjustment to accommodate the complainant's handicap. As a result, the action complained of is not considered unlawful.

Authority:

This policy decision is based on the following sections of the Title VI regulation and Section 504 Policy Interpretation No. 1.

Page 2 - Does Title VI bar discrimination on the basis of race, color or national origin in employment where the purpose of the Federal financial assistance is to provide employment?

Does Section 504 bar discrimination on the basis of handicap in employment where the alleged discrimination occurred prior to the effective date of the Section 504 regulation?

Section 80.3(c) Employment practices.

(1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the unemployment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market.

Rehabilitation Act of 1973

Nondiscrimination under Federal Grants

Section 504. No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Page 3 - Does Title VI bar discrimination on the basis of race, color or national origin in employment where the purpose of the Federal financial assistance is to provide employment?

Does Section 504 bar discrimination on the basis of handicap in employment where the alleged discrimination occurred prior to the effective date of the Section 504 regulation?

Section 504 of the Rehabilitation Act of 1973

Policy Interpretation No. 1

Policy Interpretation: The Office for Civil Rights will investigate complaints of alleged discrimination that occurred after September 26, 1973, the date section 504 became law, and prior to June 3, 1977, the date the section 504 regulation became effective, if those complaints charge violations of the statute which do not require for their resolution the interpretative language of the regulation.

. . . The question, to be answered on a case-by-case basis is whether the language of the statute provides notice that the challenged policy or practice is unlawful . . . . Discrimination against a qualified applicant for employment will be considered a violation of section 504 if adjustments would not have been needed to accommodate the applicant's handicap. However, failure to . . . reasonably accommodate the needs of handicapped applicants for employment will not be considered unlawful unless it occurs after June 3, 1977.

OSPR Memorandum of May 7, 1979